IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 697 of 1994

WITH

CRIMINAL APPEAL NO.1013 OF 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.C.PATEL
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? :

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SHIIVABHAI DALABHAI
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 697 of 1994
MR AD SHAH for Petitioner No. 1
PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE M.C.PATEL
and
MR.JUSTICE A.L.DAVE

Date of decision: 09/05/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

1. These two appeals arise out of a judgment and order rendered by learned Additional Sessions Judge, Mehsana, in Sessions Case No.218 of 1993 on 2.7.1994.

2. In that Sessions Case, two persons were tried for the offences punishable under Section 302 read with Section 34 or in the alternative Section 114 of the Indian Penal Code and Section 135 of the Bombay Police Act for having committed murder of Bhudarbhai Chhaganbhai on 2.6.1993 at about 7.00 A.M., at Nava Harijanvas of village Dunawada, taluka Harij, district Mehsana. The learned Additional Sessions Judge, after considering the evidence, came to a conclusion that the prosecution could establish the charges against accused No.1-Chamar Shivabhai Dalabhai and, therefore, convicted him of the offence punishable under Section 302 of the Indian Penal Code and sentenced him to life imprisonment and with a fine of Rs.2000/-, in default, to undergo rigorous imprisonment for three months. Aggrieved by the said order of conviction and sentence, original accused No.1 has preferred Criminal Appeal No.697 of 1994.

3. The learned Additional Sessions Judge also came to a conclusion that the prosecution could not prove the charges against accused No.2-Chamar Dalabhai Becharbhai and, therefore, recorded an acquittal in favour of that accused. The State, on being aggrieved by the said orer of acquittal, has preferred Criminal Appeal No.1013 of 1994.

4. When the matter came up for hearing, this Court is informed by both the sides that respondent-Dalabhai Becharbhai Chamar expired on February 7, 2002. A copy of the death certificate has also been produced before this Court. Since respondent in Criminal Appeal No.1013 of 1994, which is preferred by the State against the acquittal of the said respondent, has expired, the appeal abates under Section 374 of the Code of Criminal Procedure.

5. This Court is, therefore, required only to consider Criminal Appeal No.697 of 1994 on merits.

6. The facts of the case, in brief, are that deceased-Bhudarbhai Chhaganbhai was passing by the house of Bababhai Paragbhai on a public road in the Nava Harijanvas of village Dunawada, at about 7.00 A.M. on

2.6.1993 and, at that time, the present appellant-Shivabhai came there and started quarrelling. It is also the case of the prosecution that, at that time, original accused No.2-Dalabhai Becharbhai also came there and caught hold of deceased-Bhudarbhai. The appellant-Shivabhai Dalabhai, thereafter, caused injuries with a knife in the chest of the deceased. Deceased-Bhudarbhai succumbed to the injuries. The incident was witnessed by witness-Babubhai Paragbhai (Ex.31) and Maganbhai Bijalbhai (Ex.32), as they were present there. Mafabhai Jivabhai went to Harij Police Station and lodged a First Information Report in respect of this incident. The offence came to be registered vide Harij Police Station C.R.-I No.46 of 1993. On investigation, having found sufficient evidence against the accused persons, the police filed charge sheet in the Court of learned Judicial Magistrate, First Class, Harij. The learned Judicial Magistrate, First Class, Harij, after following due procedure, committed the case to the Court of Sessions, at Mehsana and the case came to be registered as Sessions Case No.218 of 1993.

7. The charge against the accused persons was framed at Ex.9 for the offence punishable under Section 302 read with Section 34, in the alternative, read with Section 114 of the Indian Penal Code and Section 135 of the Bombay Police Act. The accused persons pleaded not guilty to the charge and claimed to be tried.

8. The learned Additional Sessions Judge, after considering the evidence led by the prosecution, came to a conclusion that the prosecution was able to establish the charges against accused No.1-appellant in Criminal Appeal No.697 of 1994 and recorded his conviction for the offence of murder and sentenced him as stated above. The learned Additional Sessions Judge also came to a conclusion that the prosecution could not successfully establish the charges against accused No.2-respondent in Criminal Appeal No.1013 of 1993 and recorded his acquittal. The said judgment and order has given rise to the present appeal.

9. Learned Advocate Mr. A.D. Shah appearing for the appellant in Criminal Appeal No.697 of 1994 has taken us through the record and proceedings. He submitted that the only supporting two eye-witnesses are Babubhai Paragbhai (Ex.31) and Maganbhai Bijalbhai (Ex.32). Mr. Shah submitted that, if their depositions are seen, it is clear that here are two witnesses, who have exaggerated and improved their versions in the Court as compared to their original versions. The exaggeration or the

improvement, though appearing innocuous, is aimed at moulding their depositions according to the requirement of the case of the prosecution. Mr. Shah submitted that the witnesses or the prosecution is not coming out with correct facts and no correct material is produced to indicate the genesis of the incident. Mr. Shah also submitted that considering the nature of injuries and considering the evidence of the prosecution to indicate that there was some scuffle, the possibility of the deceased having sustained injuries in the scuffle cannot be ruled out and the benefit ought to have been given to the appellant. He submitted that, in any event, the case would be covered under the exceptions of Section 300 of Indian Penal Code and would not remain punishable under Section 302 of Indian Penal Code. At the most, it would be covered under Section 304 Part-I or Part-II of Indian Penal Code. Mr. Shah submitted that the witnesses come out with a case of the deceased having made an oral dying declaration before them which, in fact, was not disclosed by them in their previous statements. Not only that, medical evidence indicates that, with the nature of injuries sustained by the deceased, he could not have survived for more than a few minutes and he could not have spoken. Mr. Shah also submitted that the witnesses speak of injuries having been caused on head with a brick-bat whereas neither the inquest nor the postmortem indicates any such injury on head. Thus, the witnesses are out to improve their versions only with a view to ensure that the accused persons are convicted. Reliance could not have been placed upon this evidence by the Trial Court and benefit ought to have been given to the appellant. Mr. Shah submitted that the motive which is attributed to the accused persons for commission of the crime is also not correct. He submitted that land was mortaged to the accused persons earlier, but the said mortgage was redeemed and the land was given back by the accused-persons and, as such, the motive that this transaction was not liked by the appellant and, therefore, he committed murder is too far from truth. Mr. Shah, therefore, submitted that the appeal may be favourably considered and may be allowed.

10. Criminal Appeal No.697 of 1994 is opposed to by learned Additional Public Prosecutor-Mr. Jani, who also appears for the appellant in Criminal Appeal No.1013 of 1994.

10.1 Mr. Jani concedes to the situation that the State Appeal being Criminal Appeal No.1013 of 1994, would get abated in view of the fact that the respondent has expired.

10.2 Mr. Jani submitted that the evidence of the prosecution is plain, clear and trustworthy. The presence of the eye-witnesses of the incident is natural. Mr. Jani submitted that there is nothing to indicate that the case would fall under any one of the exceptions of Section 300. There is no reason to disbelieve the version of these witnesses. Some discrepancy may creep into the evidence. Some times, witnesses tempt to exaggerate their version only with a view to ensure that they are believed by the Court. The Court may view the evidence as a whole and accept the evidence which is acceptable. The Trial Court has done the same exactly while considering the case of the prosecution. As such, this Court may not interfere with the judgment recording conviction. Mr. Jani submitted that the appeal, therefore, may be dismissed.

11. We have gone through the record and proceedings and have taken a close look at the evidence. We have also considered rival side contentions in light of the evidence.

12. It is true that the prosecution case mainly depends on depositions of eye-witnesses Babubhai Paragbhai (Ex.31) and Maganbhai Bijalbhai (Ex.32). Babubhai Paragbhai, in his deposition, states that he knows Mafabhai Shivabhai, Shivabhai Dalabhai and Dalabhai Becharbhai. He also knew deceased-Bhudarbhai and that they are relatives. He says that he was sitting on a cot in front of his house at about 7.00 in the morning. He had sustained injuries about 4 to 5 days prior to the incident and had sustained a fracture and, therefore, he was sitting on the cot. He noticed Bhudarbhai Chhaganbhai coming from Juna Mohalla. He also noticed that Maganbhai Bijalbhai going towards Juna Mohalla. At that time, Shivabhai Dalabhai was standing on the Otla of his house. When Bhudarbhai was passing by the house of Shivabhai Dalabhai, Shivbhai came from behind and caught hold of Bhudarbhai and he then dragged Bhudarbhai towards the Wada. At that time. Bhudarbhai asked him why was he doing so. At that time, Dalabhai Becharbhai came there with a brick in his hand and inflicted a blow on the hind portion of deceased-Bhudarbhai. Shivabhai Dalabhai and Dalabhai Becharbhai dragged Bhudarbhai towards the cot and, at that time, Dalabhai Becharbhai caught hold of both the hands of Bhudarbhai and Shivabhai inflicted knife blows in the chest of Bhudarbhai. Maganbhai came running and accosted the assailants. The accused persons told Maganbhai that he should keep away or else he would also be lying along with Bhudarbhai. The accused

persons, therefore, went away. Khodabhai came to the spot within a short time thereafter. Mafabhai also came there to inquire from Bhudarbhai as to what had happened and Bhudarbhai told him that Shivabhai Dalabhai and Dalabhai Becharbhai had injured him. A private jeep car was brought for shifting Bhudarbhai to the hospital and Bhudarbhai was taken to hospital. However, after about 20 minutes, the jeep car came back with Bhudarbhai as Bhudarbhai had expired on the way to hospital. The witness further says that the accused persons had displeasure towards the victim as the land mortgaged to the appellant was taken back after redeeming the mortgage. The witness has been cross-examined mainly on topography part. He says that when Shivabhai caught hold of Bhudarbhai, he did not shout because he felt that they were just joking. He did not shout even when Bhudarbhai was dragged as the incident occurred within a few seconds. He also asserts his case about the mortgage of the property and redemption thereof.

13. Witness-Maganbhai Bijalhai (Ex.32) says that, on the day of the incident, he was proceeding towards temple for Darshan. He came across Bhudarbhai, who was coming from the opposite direction. He also saw Shivabhai Dalabhai standing near the Otla. When the deceased came there, Shivabhai caught hold of the deceased. Bhudarbhai inquired of him as to why he was doing so. But Shivabhai dragged him towards Babubhai's Wadi. He saw Dalabhai Becharbhai coming from back and causing injuries on the hind portion of the head of Bhudarbhai. At that time, he also saw that Dalabhai catching hold of Bhudarbhai and Shivabhai inflicting knife blows on the deceased with the knife which he had drawn out from his waistband. The witness has been cross-examined. He admits that he saw the appellant and the deceased scuffling, but the incident occurred within few seconds. He says that Dalabhai had brought the brick from his house and with that, he caused injury on the hind portion of the head of the deceased. However, Bhudarbhai did not bled from that injury. Her says that three to four blows were given by Shivabhai with the knife. Thereafter, Bhudarbhai fell down. This witness also says that when Mafabhai came, he inquired of what had happened and he was informed by Bhudarbhai that Shivabhai Dalabhai and Dalabhai Becharbhai had caused injuries to him.

14. Witness-Mafabhai is examined at Ex.21. This witness had lodged the F.I.R. He speaks about the differences between the deceased and the appellant on account of redemption of mortgage of land. He says that he heard shouts and, therefore, rushed to the spot to

find that Bhudarbhai was lying in an injured and bleeding condition. He inquired of Bhudarbhai as to what had happened and he said that Shivabhai Dalabhai and Dalabhai Becharbhai had caused injuries to him with knife. The witness has been cross-examined at length and he sticks to his version about the mortgage, its redemption and even about the incident. He denies a suggestion that he had not learnt about involvement of the appellant in the offence at the site of the incident.

15. The medical evidence is that of Dr. Girishchandra Jayantilal Nayak (Ex.42). He says that the dead body of Bhudarbhai Chhaganbhai was brought to him for postmortem on 2.6.1993 at 4.00 P.M. and he commenced the postmortem at 4.25 P.M. and concluded at 5.45 P.M. He noticed three stab wounds on the right of the chest. One was on the second intercostal space about 4 cms. away from the midline of the size of 3.5 cm. x 1 cm. x cavity deep and the second was on the third intercostal space membarane level in size 1 cm. x 0.5 cms x muscle deep. The third injury was on the 4th intercostal space 3 cms away from midline of the size of 3 cms. x o.5 cm x cavity deep in oblique direction. The doctor had also noticed incise wound over ventral aspect on the left arm of a serpent like shape of the size 4.5 cms. x 0.3 cms. x 0.3 cms. The other injury was an incise wound on ventral aspect of left knee in oblique direction of the size 3.5 cms. x 1 cm. x 1 cm. x muscle deep.

15.1 The doctor says that corresponding internal injuries were found in the lower lobe of the lungs. According to the doctor, the injuries were sufficient in ordinary course of nature to cause death an the death was caused because of shock and haemorrhage due to injury on the lung.

16. Having regard to the contentions and the evidence as stated above, what emerges is that the witnesses have added two aspects to their original version, namely, the oral dying declaration before the complainant and the injury by accused No.1 with a brick on the hind portion of the head. Apart from these exaggerations or additions, the story of these witnesses remains consistent with their original versions. The presence of these witnesses is natural as they hail from that very area and they have reasonably explained their presence at the place. As such, barring the exaggeration, there is nothing to disbelieve these witnesses. It cannot be overlooked that the witnesses tend to exaggerate their versions out of a sincere attempt to make their true story believable In this regard, decision of the Apex

Court in the case of State of U.P. v. Anil Singh, AIR 1988 SC 1998 may be profitably referred to.

17. The defence version as emerging from the cross-examination is not suggestive of any grave or sudden provocation or loss of control in heat of passion by the accused. There is nothing to indicate that the incident occurred without premeditation. On the contrary, what emerges from the evidence is that the deceased was passing by near the house of the appellant when the appellant suddenly came and quarrelled with the appellant. Accused No.2 came with a brick-bat, caused injury on the head of the deceased and then caught hold of him and the appellant taking advantage of the situation, took out a knife from his waistband and inflicted multiple blows on the deceased. The deceased was not armed. No quarrel was initiated by him. The appellant had no reason to carry a knife with him and, admittedly, a few days prior to the incident, the deceased had got the mortgage redeemed by payment Rs.18,000/- to the appellant. The argument advanced by learned Advocate Mr. Shah that the case would fall under exception to Section 300 and would be punishable under Section 304 cannot be accepted. The contention that the witnesses admit a scuffle at the time of the incident probablise the theory of the deceased having sustained injuries in the scuffle also cannot be accepted. The injuries are multiple and have gone deep into the chest indicate that they were inflicted with force and were not caused in a scuffle. Likewise, the contention that because the injuries are found very near to each other in the chest, the theory of accused No.2 having caught hold of the deceased and the appellant having inflicted the injury with knife is not probable. If that was so, the injuries would have been at different places and because the injuries are very near to each other, they might have been caused in the scuffle. This contention is also not possible to be accepted. The injuries have gone deep into the chest and have cut the lower lobe of the lungs. On the contrary, causing of three injuries very near to each other on vital part of the body with such force would rule out the possibility of the injuries having been caused in a scuffle. It is not possible to accept the contention that the incident occurred in heat of passion and that it was without premeditation. The evidence indicates that it was the appellant who pounced on to the deceased and then took out a knife from the waistband and caused injuries. Ordinarily, people do not carry knife with them and do not take it out from their waistband after pouncing on to a person. All these factors rule out the possibility suggested by learned

Advocate for the appellant although it would be pertinent to note that no such defence was taken at the trial and no such suggestion was made to any of the witnesses.

18. The foregoing discussion would indicate that the contentions raised by the appellant do not deserve acceptance. We do not find any infirmity in the judgment impugned herein and the same, therefore, deserves to be confirmed by dismissing Criminal Appeal No.697 of 1994.

19. Criminal Appeal No.697 of 1994 stands dismissed. Appeal No.1013 of 1994 stands abated.

[M.C. PATEL, J.]

[A. L. DAVE, J.]

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